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No. 1395

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FREDERICK B. KROL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR A WRIT OF CERTIORARI

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To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Frederick B. Krol, (hereafter called defendant) respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on February 27, 1967.

JUDGMENT AND OPINION OF THE COURT BELOW

On February 27, 1967, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing defendant to a term of eighteen months imprisonment. The Court of Appeals' Opinion has not as yet been reported; it is printed herewith as Appendix "A".

JURISDICTIONAL STATEMENT

On a trial to the court without a jury, the defendant, a lawyer, was convicted of aiding and abetting one Carl Madda, another lawyer, corruptly to give $200 to one Erwin Katz, an assistant United States Attorney, with intent to influence Katz' decision in connection with a civil case Katz was handling for the government, in violation of 18 U. S. Code, Sections 2 and 201(b).

On appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed by an Opinion filed February 27, 1967 (Appendix "A").

A petition for rehearing was timely filed and was denied on April 17, 1967 (Appendix "B").

The jurisdiction of this court is invoked under the provisions of Title 18, U.S. Code, 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Can defendant's assertion of his constitutional right to counsel and can his reliance upon his constitutional right to remain silent be permitted in evidence and used against him merely because the trier of the facts was a judge and not a jury?

Are constitutional rights and privileges different for those who stand trial before a court than before a jury?

May such evidence—defendant's reliance on his constitutional right to counsel and his right not to answer questions when interrogated by FBI agents—be thrice repeated during trial without violation to defendant's constitutional right to a fair trial?

May the Court of Appeals be permitted to condemn "resort to this strategy for the purpose of bringing the content of the conversations to the court's attention" while at the same time be permitted not to "regard the impropriety as constituting prejudicial error which requires a reversal" because "this was a bench trial"?

2. In the face of an Illinois statute rendering telephone electronic recordings as inadmissible in evidence as interpreted by an Illinois Supreme Court decision (*People* v. *Kurth*, 34 Ill. 2d 387) may a conviction be sustained where such electronic recordings were made of telephone calls in the light of this court's expressions in *Lopez* v. *United States*, 373 U.S. 427, suggesting that if the manner of securing electronic recordings were in violation of some statute or rule such evidence should be excluded?

Where the Court of Appeals has held that "federal and not state law furnishes the standard governing admissibility of evidence in a federal court" where electronic telephone recordings were admitted in violation of an Illinois statute making such eavesdropping a crime punishable by fine or imprisonment and further declaring such evidence inadmissible in

any civil or criminal proceeding, may such holding be sustained where federal statutes are silent on the subject?

In the light of this court's pronouncements in *Lopez* v. *United States*, 373 U.S. 427, should not this court make known its views now that both Illinois statutes and decisional law prohibit the use of electronic recordings in criminal trials?

3. Where a defendant is indicted on two counts, one of aiding and abetting a named individual to influence a federal official in his decisions and one of conspiracy with that same person to do so, may an inconsistent verdict be suffered to stand when the trial judge found the defendant not guilty on the conspiracy count, but guilty on the aiding and abetting count where the evidence was the same for both counts?

In this context, is not the holding by the Seventh Circuit in direct conflict with the holding of the Second Circuit in *United States* v. *Maybury*, 274 F.2d 899 which reversed for a trial judge's inconsistent verdict?

STATUTES INVOLVED

Title 18 U.S. Code, Sections 2 and 201(b) (relevant portions set out in Appendix "C").

Chapter 38, Sections 14-1, 14-2, 14-4 and 14-5, Illinois Revised Statutes, 1963 (relevant portions set out in Appendix "C").

STATEMENT OF THE CASE.

The defendant, a young attorney, was counsel of record for the plaintiff in a civil action (*Janus* v. *United States*) which was pending in the district court in Chicago in which action Janus sought to recover damages under the Federal Tort Claims Act for injuries sustained in a collision involving a post office vehicle. Another attorney, Carl J. Madda, was handling the *Janus* case for Krol, while assistant United States Attorney Erwin Katz represented the government. On December 17, 1963, Katz increased to $500 a prior offer he had made to Madda that the government settle the case for $300. The defendant conveyed the $500 offer to his client, Janus, indicating that it was a "ridiculous" offer. Later, on December 17, Katz went to Krol's law office where he saw Madda and met Krol for the first time (A. 8).[1] Katz testified that while in Krol's office, Madda twice offered Katz $200 to settle the case for $2,000. Katz was seated opposite Krol and Madda was about three feet to Katz' right, facing Krol. According to Katz, Krol, who was engaged in telephone conversations in response to a call, did not hear Madda make the offers.[2]

Krol testified at Madda's trial that Katz initiated the bribe offer. At the Madda trial, Krol was asked whether he knew that $200 was paid to Erwin Katz and Krol said

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[1] "A" refers to the Appendix of the trial record filed with this Petition.

[2] In a separate previous trial, Madda was convicted of a Section 201(b) violation in connection with the incidents involved and his conviction was affirmed, *United States* v. *Madda*, 7 Cir., 345 F.2d 400.

he learned that from a newspaper report he had read after Madda's arrest. (A. 38). Also, at Madda's trial Krol testified he had left a check for $200 with his secretary to give to Carl Madda on December 19 and that the secretary cashed the check on that morning (A. 39).

Evidence regarding defendant's reliance on his constitutional right to lawyer consultation and on his right to silence.

Madda was arrested on December 19, 1963 (A. 18).

Over defense objections, FBI agent Bloom testified that in the company of another agent he spoke to defendant on December 31 at Krol's office. The agent wanted to discuss Madda's arrest and Krol said he didn't care to discuss it (A. 36). The agents again spoke to Krol in his office on January 2, 1964. Over defense objections, the witness was permitted to state his conversation with Krol that they wanted to discuss Madda's arrest and Krol again "told us that he did not desire to make any statements regarding the arrest of Madda" (A. 37). He had previously spoken to Krol on the telephone on December 23, 1963, and wanted to make an appointment to see him regarding the arrest of Madda. Krol said that he would like to consult with an attorney before he made any statements (A. 37).

The matters relating to the tape recorded telephone and other conversations.

Prior to trial, defendant moved to suppress certain tape recordings of telephone conversations between himself and government witness Katz on December 18, 1963;

and further moved to suppress electronic recordings of conversations between Madda and Katz made at several places on December 18 and 19, 1963 (A. 2-3).

The evidence in this connection was as follows: Assistant U. S. Attorney Erwin Katz testified that attorney Carl Madda, representing plaintiff in a tort claim case, *Janus* v. *United States*, offered to give him $200 if Katz would increase the offer to settle the case from $500 to $2,000. This proposal was made when Katz went on December 17, 1963 to the law office of Krol at 120 West Madison Street where he met with attorney Madda who was handling the case. On the next day, December 18, 1963, at about 3:00 P.M., FBI agent Parfet affixed a tape recorder to the receiver of a telephone Katz was using by means of a suction device (A. 10). Katz gave Parfet consent so to do and to record his telephone conversation. He spoke to Krol; that conversation was electronically recorded. Over objections, he testified that what appeared on the tape of the recording device accurately recorded the conversation he had with Krol (A. 11-12). The telephone tape was introduced over objections as Gov't Ex. 13, and the recording is set out at Appendix 19-22.

In addition, Gov't Ex. 13, received in evidence over defense objections, recorded a telephone conversation of a call made from Madda to Katz at about 4:00 or 4:15 P.M. on December 18, 1963. There was no showing Madda gave his consent to the taping. The content of that telephone conversation is reproduced at Appendix 23.

Additional tape recordings were introduced as Gov't Ex. 10B, being an electronic recording of a conversation between Madda and Katz held at the Jockey Club of a

hotel on December 18, 1963 (A. 24). That recording, received in evidence over objections, appears at Appendix 25-30.

When the government offered exhibits 10B and 13, the defendant objected on the ground that the evidence was procured unlawfully (A. 41). The trial court specifically acknowledged that the Supreme Court of Illinois had just decided a case exactly in point, mentioning *People* v. *Kurth*[3] (A. 41), but nonetheless stated, "Well, objection is heard, considered and denied."

The tapes were admitted into evidence (A. 41).

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[3] 34 Ill. 2d 387; 216 N.E. 2d 154 (1966).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

Are there different constitutional standards for trials before a court as distinguished from those before a jury?

Where the Court of Appeals agrees that the trial court improperly permitted a government agent to testify that defendant desired to consult with an attorney before he talked with the FBI agent, and that he did not desire to make any statements, could that court disregard the admitted error merely because defendant's trier of the facts was a judge and not a jury?

Is the invocation of the constitutional privilege of lawyer consultation and of the privilege to remain silent permitted even a lawyer who happens to be charged with a crime?

Over defense objections, FBI agent Bloom testified that he spoke to Krol on January 2, 1964, and that Krol "told us that he did not desire to make any statements regarding the arrest of Madda".

The agent also testified that he spoke with Krol on December 23, 1963, that he then told Krol he wanted to make an appointment to see him about the arrest of Madda and Krol said, ". . . he'd like to consult with an attorney and I believe he said—he told me that he desired to consult with an attorney prior to making any statement." (Tr. 36-37.)

It is no consideration of guilt that the defendant declined to make statements or that he preferred to consult with an attorney before he made statements. Such was his constitutional right. The admission of this evidence was prejudicial, since it was neither material nor relevant to the issue being tried. A citizen is within his right when he refuses to make a statement; and the fact that he exercised such right has no tendency to prove or disprove the charge against him.

Uniquely, the Court of Appeals agreed that the government's tactic was error, for it said,

> "We agree with the defendant that the court, over defendant's objections, improperly permitted a government agent to testify that when, subsequent to Madda's arrest, the agent sought to interview Krol concerning the matter, Krol told him over the telephone that he desired to consult with an attorney prior to making any statement, and that when he visited Krol's office on two subsequent occasions, Krol told him that he did not desire to make any statement regarding Madda or the arrest of Madda." (App. "A".)

And further, the reviewing court stated,

> ". . . resort to this strategy for the purpose of bringing the content of the conversations to the court's attention is to be condemned. (Cf. *United States* v. *Watkins*, 7 Cir., 369 F.2d 170)." (App. "A".)

However, the court held,

> "But, this was a bench trial, and we do not regard the impropriety as constituting prejudicial error which requires a reversal." (App. "A").

Only under peculiar circumstances can there be any duty to speak to investigating officers during an official inquiry. *United States* v. *Pearson*, 6 Cir., 344 F. 2d 430 (1965).

The Fifth Circuit reversed a conviction because of an identical situation, *Baker* v. *United States,* 357 F. 2d 11 (1966). The court held (pp. 13-14):

> "... it was reversible error to have allowed the FBI agent to testify that when appellant was first questioned, he indicated that he wanted a lawyer and thereafter made no further statement ... In asking for counsel before making any statement, appellant was exercising a constitutional right which the Supreme Court has time and again declared to be guaranteed to all persons accused of crime. To have proven that appellant requested the right of counsel and thereafter made no further statement, was, we feel, as objectionable as it would have been to comment on a defendant exercising his constitutional right not to take the witness stand."

Similarly, the First Circuit reversed the conviction in *Fagundes* v. *United States,* 340 F. 2d 673 (1965), even though the evidence was "clearly enough to warrant the jury's verdict." When the defendant testified to an alibi in connection with his defense of an accusation of robbery, he was asked, "... why he had not protested his innocence when he was arrested instead of refusing to say anything and asking to see a lawyer ..." (p. 677). This error was of constitutional proportions. For, as the court said, p. 677:

> "His assertion of one constitutional right, his right to counsel, and his reliance upon another constitutional right, his right to remain silent when charged with crime, we think cannot be used against him substantively as an admission of guilt, for to do so would be to render the constitutional rights mere empty formalities devoid of practical substance."

The right to silence upon interrogation is akin to the right of the defendant not to take the witness stand in his own defense, *Helton* v. *United States*, 5 Cir., 221 F. 2d 338, 341-342.

Invoking the constitutional privilege against self-incrimination does not give rise to an inference that the witness has done something wrong or that he is guilty of an offense, *Grunewald* v. *United States*, 353 U.S. 391.

This court's most recent expression in *Spevack* v. *Klein*, 385 U.S. 511 (decided January 16, 1967) held that lawyers are not second class citizens with respect to the invocation of their constitutional rights. There, a lawyer's refusal to testify about the performance of his duties was held to be improper grounds for disbarment. Here, a lawyer's refusal to answer questions of an interrogating FBI agent before he consulted with his own lawyer and his insistence upon remaining silent ought not to have been used as evidence against him.

The admitted impropriety is of constitutional proportions.

And although the Court of Appeals condemned the prosecutorial misconduct, defendant is condemned to imprisonment (not to mention other incidental punishments which will flow from the conviction.)

II.

This Court should announce whether evidence obtained by means of electronic eavesdropping in violation of a specific state statute may be used in a federal prosecution.

Where federal officers and agents violate the criminal laws of a State in the gathering of evidence, may such evidence be admitted in a federal prosecution?

Prior to trial the defendant moved to suppress electronic recordings of certain telephone and other conversations made in violation of the Illinois Criminal Code, Chap. 38, sec. 14-1 *et seq.*, of the Illinois Revised Statutes, 1961 (A. 2). The motion was denied and tape recordings, Gov't Ex's. 10B and 13, were admitted into evidence. Exhibit 13 was a recording of a phone conversation between government witness Katz and defendant Krol (A. 19-22), and of another telephone conversation between Katz and the principal offender, Madda (A. 23).

Their admission into evidence was error of constitutional dimensions.

Whatever may have been the prior holdings of the 7th Circuit Court of Appeals (*United States* v. *Pullings*, 321 F. 2d 287, 295; *Magee* v. *Williams*, 329 F. 2d 470, 473-474) on the strength of the dicta in *People* v. *Dixon*, 22 Ill. 2d 513, 516, 177 N. E. 2d 224 (1961), the Supreme Court of Illinois has now clearly ruled that the introduction of evidence in a criminal trial of a recording of telephone or other conversation made without the consent of all the parties is illegal. *People* v. *Kurth*, 34 Ill. 2d 387, 216 N. E. 2d 154 (decided March 24, 1966).

The *Kurth* decision was specifically called to the court's attention at the time of the trial in the case at bar (A. 41).

And the trial court specifically acknowledged that the Supreme Court of Illinois had decided a case exactly in point and mentioned the *Kurth* decision. Notwithstanding, the court admitted the tapes of the telephone and other recordings into evidence (A. 41).

The question is whether evidence obtained in violation of the criminal statutes of Illinois forbidding eavesdropping may be used in a federal prosecution, where there is no federal statute on the subject. The famous "silver platter" doctrine cases—*Elkins* v. *United States*, 364 U. S. 206 (1960) and *Rios* v. *United States*, 364 U. S. 253 (1960), strongly impel that such evidence as procured by the government witness Katz could not be used. *Elkins* and *Rios* struck down federal convictions where state officers had obtained evidence in contravention of state laws. The evidence so illegally obtained was then used in federal prosecutions, which this Court held constitutionally impermissible.

If the federal agents and officers attempted to use a tape recording of a telephone conversation obtained by them in a State prosecution, the holding in *Kurth, supra*, would prevent them.

What is presented here is a question of first impression. Federal agents and officers used evidence obtained in violation of Illinois statutes to convict in a federal prosecution. This may not constitutionally be done.

The Illinois Eavesdropping Act (Ill. Rev. Stat. 1963, Chap. 38, Article 14) provides as follows:

Section 14-1:

> "(a) Eavesdropping device.
>
> "An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by other means . . .

"(b) Eavesdropper

"An eavesdropper is any person, *including law enforcement officers,* who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article." (Emphasis added.)

Section 14-2 provides as follows:

"A person commits eavesdropping when he: (a) uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or

(b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device."

Section 14-4 provides for a fine or imprisonment of any person convicted of eavesdropping.

And Section 14-5 provides that

"any evidence obtained in violation of this article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings . . ."

In *Kurth, supra,* certain public officials of a township were convicted of conspiracy to obtain money and property by false pretenses. Part of the evidence against them consisted of tape recordings of telephone conversations between one Smith and one Kurth. Smith, who was a State's witness, consented to the recording of the telephone conversations. The recordings were admitted into evidence over defendant's objections, as in the case at bar. The court took note that certain dicta contained in *People* v. *Dixon,* 22 Ill. 2d 513, 177 N. E. 2d 224 suggested that consent of one of the parties to the telephone conversation alone was sufficient to make the recording admissible. The Illinois Supreme Court stated, 216 N. E. 2d 157:

"It seems to us that the reasonable construction of the statute, which will insure the right of privacy, is that any party who has not consented to the recording or transmission of his conversation may bar its admission in evidence against him . . . As to 'any party' who has consented, the recorded conversations are admissible; but as to the one party who has not consented, the recording is inadmissible . . . Since none of the other parties [than Smith] to the conversations had any knowledge that the conversations were being recorded and did not consent to such recording, the recordings are inadmissible against them. To the extent that *People* v. *Dixon*, 22 Ill. 2d 513, 177 N. E. 2d 224 may be construed to hold to the contrary, it is overruled."

Inasmuch as the manner in which the telephone and other recordings were obtained clearly violated the Illinois Criminal Code, this court has previously suggested what the trial court should have done. In *Lopez* v. *United States*, 373 U. S. 427 (1963), an Internal Revenue agent wired himself for sound and recorded an interview with Lopez who offered him bribes to discharge his functions improperly. The wire recordings were admitted into evidence over Lopez's objections. This Court affirmed; but indicated its decision would be otherwise if the device used by the government agent violated some statute or rule of procedure. Your Honors stated, p. 440:

"The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, *unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a Federal Court.* See e.g. *McNabb* v. *United States*,

318 U.S. 332 . . . *Mallory* v. *United States,* 354 U. S. 449 . . ." (Emphasis added.)

The Court of Appeals disposed of the Illinois ruling (*People* v. *Kurth, supra*) by stating that "federal and not state law furnishes the standard governing admissibility of evidence in a federal court." (Appendix "A")

Considering widespread evidence of illegal eavesdropping (see confessionals by the Attorney General) and considering the undisputed fact here of State criminality engaged in by the federal officers, this Court should decide whether *Lopez* v. *United States, supra,* applies, or whether some other standard of federal-state relations impel a holding prohibiting the use of electronic recordings as here demonstrated.

III.

An inconsistent verdict rendered by a trial judge may not stand.

The holding of the Seventh Circuit is in conflict with that of the Second Circuit on this point.

The close relationship between conspiracy and aiding and abetting was clearly recognized in *Pinkerton* v. *United States,* 328 U. S. 640 where Your Honors stated, p. 647:

> "The criminal intent to do the act is established by the formulation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was an execution of the enterprise. *The rule which holds responsible, one who counsels, procures and commands another to commit a crime is founded on the same principle.*" (Emphasis added.)

In the case at bar the court found the defendant not guilty of conspiracy (Count 2); but in an inexplicable ruling found him guilty of the charges in Count 1—aiding and abetting in the commission of the offense (A. 4, 42). A reading of the indictment will demonstrate that the substantive offense charged in Count 1—aiding and abetting Madda to bribe Katz—is exactly what the defendant is charged with in Count 2—conspiring with Madda to bribe Katz (A. 1-2).

The counts are not only closely related but are, to all intents and purposes, identical. When the court found the defendant not guilty of Count 2, it was tantamount to a finding of not guilty on Count 1.

The defendant moved for a severance of the counts before trial (A. 3-4) and moved further that the government elect on which of the two counts it intended to proceed (A. 41). His motions were denied.

Assuming that the court had granted the severance and tried the defendant on the conspiracy count first with a finding of not guilty, could the court have found him guilty on a separate trial of Count 1? *Cosgrove* v. *United States*, 9 Cir., 224 F. 2d 146 (1954) and *United States* v. *Maybury*, 2 Cir., 274 F. 2d 899, hold that the conviction under circumstances here obtained cannot stand.

In *Cosgrove*, the defendant was charged with conspiring to defraud the United States of certain penalties for filing late tax returns and with "aiding, assisting, procuring and advising" in the filing of such returns. Cosgrove was found not guilty by a jury of the charge of conspiracy; as to the counts relating to the charge of aiding and abetting the jury could not agree and a mistrial was declared.

Defendant was retried, and was then convicted of the substantive aiding and abetting charge. The question was whether the conspiracy and the aiding and abetting issues were so identical as to prevent the second trial. The Ninth Circuit held that in view of defendant's former acquittal on the conspiracy count, the judgment of conviction against him in the second trial had to be reversed because of the application of the doctrine of *res judicata*.-*Cosgrove*, p. 156.

Although the posture of the case at bar is somewhat different because the inconsistent rulings were entered in the same case, the *reasoning* is the same because the facts upon which the defendant was convicted on Count 1 were identical with the facts upon which he was found not guilty on Count 2. It is obvious that one cannot be guilty of aiding or abetting another unless the other person has committed an offense, and unless the two—the aider and abettor and the principal—have a concert of criminal behavior leading toward the commission of the criminal offense. Similarly, the conspiracy allegation is one in which two individuals were charged with agreeing to commit an offense, which agreement is shown by a concert of action leading toward the commission of an offense.

A more cogent reason why the conviction cannot stand is that *an inconsistent verdict rendered by a trial judge based on the same set of facts will be reversed. United States* v. *Maybury*, 2 Cir., 274 F. 2d 899 (1960) is authority for this proposition. In a well reasoned opinion delineating the history of the law on inconsistent verdicts, the Second Circuit carefully pointed out the differences between inconsistent verdicts rendered by juries and those by trial judges sitting without juries. Because in a criminal case, "the jury has the power to bring in a verdict in the teeth of both

law and facts'' (*Horning* v. *District of Columbia*, 254 U.S. 135, 138) then a jury might properly render inconsistent verdicts.

The Second Circuit explained why in *Steckler* v. *United States*, 7 F.2d 59 at p. 60:

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

And continuing to explain the legal propriety of jury verdict inconsistency, the same court stated later in *United States* v. *Maybury*, 274 F. 2d 899 at 903:

> "Another special consideration in connection with jury verdicts is the requirement of unanimity. And one does not challenge the 'voice of the country' for inconsistency among the jurors."
>
> "Ignoring inconsistency in a jury's disposition of the counts of a criminal indictment may thus be deemed a price for securing the unanimous verdict that the Sixth Amendment requires. *Andres* v. *United States*, 1948, 333 U. S. 740, 748, 68 S. Ct. 880, 92 L. ed. 1055. *Hibdon* v. *United States*, 6 Cir., 1953, 204 F. 2d 834, 73 ALR 2d 1130, and for interposing 'the voice of the country' against the possibly excessive zeal of prosecutors. *Steckler* and *Dunn* v. *United States*, 284 U. S. 390 thought it not too high a price for 'the most transcendent privilege which any subject can enjoy or wish for * * *' 3 Blackstone, Commentaries, 379."

With all this, the court went on to say that none of these considerations was fairly applicable to the trial of a criminal case before a judge. For, p. 903:

> "While the historic position of the jury affords ample ground for tolerating the jury's assumption of the power to insure lenity, the judge is hardly the 'voice of the country' even when he sits in the jury's place. If he deems an indictment multiplicitous, he has only to say so, and the time for him to exercise any 'lenity' that he deems warranted is on sentence. There is no need to permit inconsistency in the disposition of various counts so that the judge may reach unanimity with himself; *on the contrary, he should be forbidden this easy method for resolving doubts.* . . . We do not believe we would enhance respect for law or for the courts by recognizing for a judge the same right to indulge in 'vagaries' in the disposition of criminal charges that for historic reasons, has been granted the jury. *United States* v. *Dotterweich*, 1943, 320 U. S. 277, 279, 64 S. Ct. 134, 88 L. ed. 48. We know the rule of logic in law is not unlimited; but 'Holmes did not tell us that logic is to be ignored when experience is silent' (Cardozzo, the Nature of Judicial Process, 33). Since we find no experience to justify approval of an inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail." Emphasis added.)

The reviewing court merely held that the "result here is not so wholly irreconcilable with any rational theory that inconsistency is demonstrated." (App. "A"). But the court would have said the same thing had defendant been acquitted of aiding and abetting and been found guilty of conspiracy.

We know of no decision by this court on this point. We submit this case an appropriate one for consideration of the *Maybury* holding.

CONCLUSION

On Point I, the Court of Appeals, although recognizing the impropriety of prosecutorial tactics—and even condemning them—failed to uphold the constitutional right to remain silent and the right to lawyer consultation—Fifth and Sixth Amendments to the Constitution; *Miranda* v. *Arizona*, 384 U.S. 436.

As to Point II, we respectfully submit the situation in this country is ripe for your Honors to speak where evidence was obtained by federal officers in violation of the criminal statutes of a State.

And with respect to Point III, the Seventh Circuit conflict with the Second Circuit as to inconsistent verdicts rendered by a trial judge hearing a case without a jury should be resolved.

We pray that Your Honors will consider this a fit case to warrant this court's attention.

Respectfully submitted,

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